

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**FIRST APPEAL No. 750 of 1994****For Approval and Signature:****HONOURABLE MR.JUSTICE P.B.MAJMUDAR**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of
the judgment ?

4 Whether this case involves a substantial question of
law as to the interpretation of the constitution of
India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HUSENABIBI WD/O AMIRBHAI YASINBHAI AND ANOTHER**Versus****ABDULMIYA KASAMMIYA KURESHI AND OTHERS**

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Appearance :

MR HARIN P RAVAL for Appellants.

NOTICE SERVED for Respondents No.1 - 4, 4.2.2, 4.2.3, 4.2.4,
4.2.6,4.2.7

MR AK TRIVEDI for Respondent no.1.

PARTY-IN-PERSON for Respondent no. 4.2.1

MS HINA DESAI for Respondent no. 4.2.5

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR**Date : 14/12/2006****ORAL JUDGMENT**

1) By filing this Appeal under Section 96 of the Civil Procedure Code,
the appellants have challenged the judgement and decree of of the

learned Judge, City Civil Court, Ahmedabad dated 15-2-1994 passed in Civil Suit No.3399/1985. By the aforesaid judgement and decree, the learned trial Judge has dismissed the suit filed by the appellants – plaintiffs for getting decree for specific performance of the suit agreement. It is the case of the plaintiffs that there is a property belonging to the defendants no.1 to 3, which is situated in Dariapur Ward No.1 in Bukhara Mohalla, description of which is given in para 1 of the plaint. The plaintiffs were occupying first floor in the suit house as tenants. The said tenanted portion is having Municipal Census no.2724/1 and 2724/2. It is the case of the plaintiffs that they were occupying the aforesaid portion as a tenant of defendant nos.1 to 3. It is the case of the plaintiffs that defendants no.1 to 3 wanted to sell the suit property and, therefore, they executed an agreement to sell in favour of the plaintiffs on 28-5-1982 and earnest money of Rs.2,800/- was paid by the plaintiffs to said defendants No.1 to 3. As per the case of the plaintiffs, total consideration was fixed at Rs.28,000/- and the said Banakhat was also got registered and sale deed was to be executed within six months. The defendants No.1 to 3 were supposed to get the property marketable by getting title clearance within the aforesaid period. The property was also required to be cleared from the ULC Authority within a period of six months from the date of agreement to sell and necessary permissions were also required to be taken by defendants No.1 to 3 from the ULC authority. After getting such permission from the ULC authority, sale deed was to be executed within a period of 90 days by defendants no.1 to 3.

2) It is the case of the plaintiffs that defendants no.1 to 3 have failed to satisfy the plaintiffs about the title clearance of the property. Thereafter, the plaintiffs gave a notice to defendants no.1 to 3 on 21-12-1982 asking them to inform the plaintiffs whether the title of the

property is clear and marketable and whether it is free from all encumbrances and if it is so, to execute the sale deed in favour of the plaintiffs. As per the averments made in paragraph 5 of the plaint, said notice was received by defendants no.1 to 3 on 24-12-1982. As per the averments made in paragraph 6 of the plaint, defendants no.1 to 3 sent a notice dated 20-12-1982, which was received by the plaintiffs on 27-12-1982, whereby defendants no.1 to 3 pointed out to the plaintiffs that Banakhat in question is cancelled. Thereafter, defendants no.1 to 3 sent a letter of attornment dated 3-1-1983 informing the plaintiffs that the property in question is sold to defendant no.4. As the defendants no.1 to 3 have not executed the sale deed in favour of the plaintiffs, the plaintiffs filed aforesaid suit for specific performance of agreement to sell dated 28-5-1982. The plaintiffs have asked for declaration to the effect that the sale deed executed by defendants no.1 to 3 in favour of defendant no.4 dated 3-1-1983 may be held to be illegal and not binding to the plaintiffs and it was also prayed that a decree may be granted asking defendants no. 1 to 3 to act as per the agreement dated 28-5-1982 and for directing defendants no.1 to 3 to execute sale deed in favour of the plaintiffs in connection with agreement to sell dated 28-5-1982.

3) The said suit was resisted by defendants. So far as defendants no.1 to 3 are concerned, they have filed their written statement at Exh.28 contending, inter alia, that the plaintiffs were not ready and willing to perform their part of the contract and the time was essence of the contract. It is also contended that though necessary documents were shown to the plaintiffs with regard to title clearance of the suit property, the plaintiffs have never tried to pay the remaining consideration and, because of that the Banakhat in question was cancelled by said defendants, therefore, suit was required to be dismissed. It is the say of the said defendants in their written statement that the plaintiffs were

never ready and willing to perform their part of the contract and even though the plaintiffs were informed by letter dated 14-6-1982 that it is not necessary to take permission under the ULC Act, yet the plaintiffs have not taken any steps for paying the remaining amount. On this and other such grounds, the suit is resisted by the original owners, defendants no.1 to 3.

4) Defendant no.4, who is the purchaser of the property in question by way of a registered sale deed, has also filed her written statement at Exh.20, contending inter alia that she had no knowledge about the suit Banakhat till she received notice from the plaintiffs on 11-1-1983. It is the say of defendant no.4 that she is a bona fide purchaser for value without notice. It is the say of the said defendant that agreement to sell executed by the original owners in favour of the plaintiffs was already cancelled by the original owners and, thereafter, sale deed was executed in favour of defendant no.4. On these and such other averments, the suit was resisted by defendant no.4.

5) During the pendency of the suit, original defendant no.4 has died and her heirs were brought on record.

6) Learned trial Judge framed various issues at Exh.49 and after considering oral and documentary evidence on record, came to the conclusion that it is proved that defendants no. 1 to 3 had executed an agreement to sell in favour of the plaintiffs on 28-5-1982, which is a registered agreement. However, learned trial Judge found that the plaintiffs have failed to prove that defendants no.1 to 3 had committed breach of suit agreement. Learned trial Judge also found that the plaintiffs were not ready and willing to purchase the suit property. Learned trial Judge also found that the sale deed executed by defendants

no.1 to 3 in favour of defendant no.4 is not illegal or fraudulent document. Learned trial Judge also found that the time was essence of the contract. It is also found that the plaintiffs have committed breach of the terms of Banakhat. Accordingly, learned trial Judge has dismissed the suit. Against the aforesaid decree of the trial Court, original plaintiffs have preferred this First Appeal under Section 96 of the Civil Procedure Code.

7) Mr.Harin Raval, learned advocate for the appellants submitted that the plaintiffs have proved their case for getting decree for specific performance of the suit agreement and that the plaintiffs were always ready and willing to perform their part of the contract. It is submitted by Mr.Raval that time was never the essence of contract. It is further submitted by Mr.Raval that since defendants no.1 to 3 had not tried to clear the title of the suit property within a period of six months, it was not obligatory on the part of the plaintiffs to pay remaining consideration within the said period. It is submitted by Mr.Raval that after the plaintiffs sent a notice dated 21-12-1982, which the defendants had received on 24-12-1982, the defendants sent a letter dated 20-12-1982, which was received by the plaintiffs on 27-12-1982. It is submitted by Mr.Raval that aforesaid letter, which is at Exh.66, was sent by UPC, whereby defendants no.1 to 3 have pointed out to the plaintiffs that since the plaintiffs have not paid the remaining consideration, suit Banakhat is hereby cancelled. Mr.Raval further submitted that the said letter was received by his client on 27-12-1982, therefore, it can be presumed the said letter must have been written after 24-12-1982, i.e., after receiving the letter written by the plaintiffs, which was sent on 21-12-1982 and which was received by defendants no.1 to 3 on 24-12-1982. Mr.Raval also submitted that the agreement in favour of his clients was never cancelled by defendants no. 1 to 3. Mr.Raval also submitted that,

thereafter, within a very short time, a sale deed was executed by defendants no.1 to 3 in favour of defendant no.4, and, therefore, the learned trial Judge should have passed a decree for specific performance in favour of the plaintiffs and the trial Court should have set aside the sale deed executed in favour of defendant no.4. Mr.Raval further submitted that defendant no.4 cannot be said to be a bona fide purchaser for value without notice, because since the suit banakhat was a registered document, even if defendant no.4 may not have actual notice, it can be presumed that he is having constructive notice about the Banakhat. Mr.Raval further submitted that the trial Court should have used its discretion appropriately and instead of refusing the decree for specific performance, trial Court should have granted the same.

8) Mr.Raval further submitted that considering the oral as well as documentary evidence on record, it can be presumed that the plaintiffs were always ready and willing to perform their part of the contract althroughout but since the original owners (defendants no.1 to 3) did not satisfy the plaintiffs that the title of the property in question is clear and marketable, it was not obligatory on the part of his clients to sent remaining amount of consideration within the stipulated time of six months. It is also submitted by Mr.Raval that since the property in question was mortgaged with Ahmedabad Peoples Cooperative Bank, till the mortgage was redeemed by defendants no.1 to 3, the plaintiffs were not required to perform their part of the contract. It is also submitted by Mr.Raval that since defendants no.1 to 3 have not informed the plaintiffs that the property is redeemed from mortgage, his clients were not required to pay the remaining amount of consideration within a period of six months and, therefore, it cannot be said that his clients have committed breach of the suit agreement. Mr.Raval also submitted that as per the abstract of the property register, which is at Exh.76, the suit

property can be said to have been cleared from the mortgage and as per the said abstract of property register, there is an entry dated 22-9-1982 to the effect that as per the letter of the bank dated 15-7-1982, the property is redeemed from mortgage. It is also the argument of Mr.Raval that after the notice of the plaintiffs at Exh.65, which is dated 21-12-1982, defendants no.1 to 3 gave a notice wherein deliberately earlier date is mentioned and it is informed to the plaintiffs by defendants no.1 to 3 that agreement to sell is cancelled by them as the plaintiffs have not tried to perform their part of the contract. As pointed out earlier, it is argued by Mr.Raval that if really said letter was dated 20-12-1982, it would not take seven days to reach to the plaintiffs, as it was received by the plaintiffs on 27-12-1982. Mr.Raval further submitted that in a hot hurry defendants no.1 to 3 have executed sale deed in favour of defendant no.4. It is further submitted by Mr.Raval that defendants no.1 to 3 have deliberately sent aforesaid notice dated 20-12-1982 by UPC so that there may not be any cogent evidence available to show as to when said notice/letter was posted. Mr.Raval further submitted that defendants no.1 to 3 executed the sale deed in favour of defendant no.4 on 3-1-1983, for which a stamp was purchased on 1-1-1983 and, thereafter, defendants no.1 to 3 gave attornment notice on 3-1-1983, which was replied by the plaintiffs on 11-1-1983, which is at Exh.67. It is submitted by Mr.Raval that in said reply, the plaintiffs have clearly stated that the Banakhat is in existence and defendants no.1 to 3 should execute the sale deed in their favour. It is also stated in said reply that attornment notice given by defendants no.1 to 3 is not valid and legal. Mr.Raval has also relied upon oral and documentary evidence in support of his submissions.

9) So far as original owners (defendants no.1 to 3) are concerned, nobody has remained present on their behalf before this Court. So far as

original defendant no.4 is concerned, she has already expired, however, her husband – Gulam Mohammed Musabhai, who is defendant no.4/1 has appeared in person and submitted that he is a bona fide purchaser for value without notice. It is submitted by him that he was never aware about any agreement between the original owners and plaintiffs. It is submitted by defendant No.4/1 that the plaintiffs were never ready and willing to perform their part of the contract. It is submitted by him that the plaintiffs were never in a position to purchase the property in question, however, subsequently, when sale deed was executed in his favour, then the plaintiffs have tried to get the property on the basis of the agreement to sell in question. It is submitted by him that the trial Court has rightly appreciated documentary and oral evidence on record and, therefore, the appeal is required to be dismissed as there is no substance in the appeal.

10) On behalf of one of the heirs of original defendant no.4, learned advocate Ms.Hina Desai, has appeared through legal aid and submitted that the trial Court has rightly declined the relief for specific performance of the suit agreement. She further submitted that it cannot be said that the trial Court has exercised its discretion arbitrarily or contrary to law. It is submitted by her that this is not a case in which the decree for specific performance can be granted as during the time limit of the suit agreement, the plaintiffs have never tried to assert their rights nor they have taken any steps for performing their part of the contract. It is also submitted by her that the plaintiffs have never made any attempt for getting the sale deed executed in their favour. It is argued by Ms.Desai that the plaintiffs had no intention to purchase the property. It is submitted that under these circumstances, the appeal is required to be dismissed.

11) Mr.Raval alternatively prayed that, in any case, the Court may direct defendants no.1 to 3 to pay appropriate compensation to the plaintiffs for committing breach of the agreement in question.

12) I have heard learned advocates as well as party-in-person in detail. I have also gone through the oral as well as documentary evidence on record. The question, which is required to be considered by this Court in this appeal is whether the plaintiffs are able to prove that they were ready and willing to perform their part of the contract and whether decree for specific performance is required to be granted by considering the evidence on record or whether any amount of compensation can be awarded in favour of the original plaintiffs.

13) Before answering the aforesaid questions, reference is required to be made to the agreement to sell, which is at Exh.64. Said agreement is dated 28-5-1982. As per the aforesaid agreement, defendants no.1 to 3 agreed to sell the property to the plaintiffs for Rs.28,000/- and at the time of executing said agreement, the plaintiffs had paid Rs.2,800/- in cash to defendants no.1 to 3. As per clause 3 of the said agreement, time limit fixed for performance of the Banakhat is six months. It is provided in the said agreement that within said time limit, sellers were to satisfy the plaintiffs about the title clearance of the suit property. In Clause 4 of the agreement, it is provided that within the aforesaid period, the sellers were required to obtain necessary permission under the ULC Act, 1976 for selling the property, and after getting such permission from ULC authority, sale deed was to be executed. In Clause 6 of the agreement, it is provided that within the stipulated time of six months, if the sellers satisfy the purchasers about the title clearance of the property and obtains necessary permission under the ULC Act, and yet the purchasers (plaintiffs) fail to get the sale deed executed within the stipulated time,

the Banakhat shall stand cancelled and the amount paid towards the earnest money shall be forfeited. Said agreement is signed by the sellers as well as purchasers and some witnesses.

14) It is not in dispute that the plaintiffs and defendants no.1 to 3 have entered into said agreement at Exh.64. Subsequently, according to defendants no.1 to 3, a letter was sent by them to the plaintiffs on 14-6-1982, by which the plaintiffs were informed that since the property in question is less than 1,000 sq.mtrs., permission under ULC Act is not necessary. In the said letter, it is mentioned that nobody has got any right, title or interest in the suit property in any manner.

15) It is argued by Mr.Raval that there is nothing to show that the plaintiffs have received such letter, which was sent by UPC. He further submitted that, the plaintiffs were not aware about aforesaid facts and, therefore, it was not necessary for them to get the sale deed executed within 90 days from ULC clearance, as per stipulation in agreement. Mr.Raval, therefore, submitted that the plaintiffs were althroughout under impression that title was required to be cleared and that is why they were not required to perform their part of the contract within the stipulated time.

16) Other documentary evidence on record is a notice dated 21-12-1982 sent by the plaintiffs to defendants no.1 to 3, which is at Exh.65. By the said letter, the plaintiffs pointed out to defendants no.1 to 3 that the defendants have not shown anything in connection with title clearance of the suit property.

17) There is also an attornment notice dated 3-1-1983 given by defendants no.1 to 3, which was replied by the present plaintiffs on 11-1-

1983.

18) There is also a documentary evidence at Exh.76, which is an abstract of property card wherein there is an entry dated 22-9-1982, pointing out that as per letter of the bank dated 15-7-1982, since an amount of Rs.4,000/- has been paid by defendants no.1 to 3, entry regarding mortgage of the property is to be treated as cancelled. As per the said entry in the property card, which is at Exh.76, the bank has written a letter dated 15-7-1982 to City Survey authority regarding payment of Rs.4,000/- by original owners to the bank on 29-7-1977 and accordingly, entry regarding mortgage is cancelled.

19) On behalf of the plaintiffs one, Samatullah Khan has given his oral evidence at Exh.59. Plaintiff no.1 is the mother-in-law of said witness and plaintiff no.2 is the wife of said witness. Said witness has given his evidence in view of the power of attorney given to him, which is at Exhs.60 and 61. Said witness has stated in his evidence that he is aware about the suit transaction. Said witness has stated that defendants no.1 to 3 were the joint owners of the suit property. Plaintiff no.1 was residing as a tenant in part of the suit property with her sister-in-law, namely, Ayeshabibi and they were occupying Municipal census number 2724/1 and 2724/2. It is stated by him that municipal census no.2724 which is on the ground floor was occupied by defendant no.4/1 Gulam Mohammed Musabhai as a tenant.

20) Said witness has given evidence with regard to agreement to sell dated 28-5-1982. Said witness has said in his chief examination that defendants no.1 to 3 had failed to point out anything regarding title clearance within six months, as provided in the agreement to sell. He also stated that defendants no.1 to 3 have never informed either orally or

in writing that the title regarding the suit property is clear. He has also further stated that defendants no.1 to 3 had orally assured the plaintiffs that sale deed will be executed in due course. Said witness has said that at the time when they obtained property card, they came to know that said property was under mortgage of a cooperative bank. Said witness has also stated about the notice given to defendants no.1 to 3 dated 21-12-1982, which is at Exh.65 as well as notice given by defendants no.1 to 3 dated 20-12-1983, which is at Exh.66. Said witness has also stated in his chief examination that prior to notice dated 20-12-1982, defendants no.1 to 3 had not sent any letter or notice to the plaintiffs.

21) In his cross-examination, said witness has stated that plaintiff no.1 is residing with him and that plaintiff no.1 had filed a criminal case against defendants no.1 to 3 in the year 1984 for cheating, but the said complaint was dismissed on the ground that the dispute is of civil nature. Said witness has said that in the said criminal case, nobody had given any evidence on behalf of the plaintiffs. In paragraph 3 of his cross examination, said witness has admitted that plaintiff no.1 is not doing any business nor is having any bank account and even in connection with notice correspondence, he had gone to the advocate.

22) Said witness has admitted in paragraph 4 of his cross-examination that he is doing business of building contract and he is aware about the Urban Land Ceiling Act. Said witness has further admitted that he had never requested defendants no.1 to 3 to extend the date of Banakhat. He has also admitted in paragraph 4 of his cross-examination that date mentioned in Banakhat was to be over by 28-11-1982, but no occasion had taken place to get the said date extended. He has also admitted that he had never gone to defendants no.1 to 3 for verifying the documents in connection with title clearance of the suit property. He has, however,

stated that he had gone at the house of defendants no.1 to 3 for the purpose of getting sale deed executed. He has denied the suggestion that notice dated 20-12-1982, which was sent by defendants no.1 to 3 by way of UPC was received by him on 21-12-1982. He has also denied the suggestion that after receiving said notice he had sent notice dated 21-12-1982, asking defendants no.1 to 3 to execute the sale deed. He denied the suggestion that the plaintiffs were not ready and willing to perform their part of the contract. He has also denied suggestion that at the time when the agreement was entered into, the property was not subjected to any mortgage. He has admitted in paragraph 7 of his cross-examination that he was not aware as to when the title of the property was cleared.

23) On behalf of the defendants, defendant no.1 – Abdullamiya Kasammiya gave evidence at Exh.71. He has said in his evidence that defendants no.2 and 3 are his sisters. Said witness has said in his chief examination that he had agreed to sell the property for Rs.28,000/- for which Rs.2,800/- was paid towards earnest money by the plaintiffs and remaining amount was to be paid within six months. He has stated in his evidence that as per the recital in the suit agreement, permission of Collector was required to be taken under ULC Act, however, on inquiry from Collector office it was found that it is not necessary to take permission and in that view of the matter, he had informed plaintiffs no.1 and 2 about said fact by writing a letter dated 14-6-1982, which was sent through UPC, which is exhibited at Exh.62. Said letter was signed by defendants no.1 to 3. In his evidence he has further stated that in spite of the fact that said letter was received, the plaintiffs never approached defendants no.1 to 3 for getting the sale deed executed by paying the remaining consideration. He has stated that he was willing to sell the property to the plaintiffs. He also stated that the plaintiffs have

never informed either orally or in writing that sale deed may be executed and that they are ready and willing to pay the remaining consideration. Said witness further stated that he had requested the plaintiffs to pay remaining consideration and to get the sale deed executed within time, however, the plaintiffs had informed him that they do not have financial capacity. Said witness has also stated in his evidence that on 20-12-1982, a notice was given to the plaintiffs, which is at Exh.66, informing them that Banakhat in question is cancelled and amount of earnest money is forfeited. Said notice was sent by way of UPC as well as Registered Post A.D. After that the suit property was sold and when attornment notice was given, the plaintiffs gave reply for the first time on 11-1-1983, which is at Exh.67. It is the say of the said witness that even though the notice sent by them regarding cancellation of Banakhat dated 20-12-1982 was received by the plaintiffs on 21-12-1982, the plaintiffs had not meet said defendants for the purpose of getting the sale deed executed. Said witness has denied that defendants no.1 to 3 have committed breach of the suit agreement. He has also produced the judgement of the Criminal Court, which is at Exh.72 in the record. He has also stated in his evidence that in the criminal case, evidence of plaintiff no.1 was recorded and evidence of son-in-law of plaintiff no.1 was also recorded, which is at Exh.73 and 74.

24) In the cross-examination, said witness has stated that all documents were shown to the plaintiffs regarding title clearance and even city survey record was also shown to them. He has stated that in past the property was subjected to mortgage with a cooperative bank but at the time when the agreement to sell was executed in favour of the plaintiffs, no mortgage was in existence.

25) On behalf of defendant no.4, the purchaser, Gulam Mohammed

Musabhai was examined at exh.75. Said witness has stated that he is occupying the ground floor portion of the suit property as a tenant and was doing business in the said portion. He has stated about the sell transaction and the amount, which he has paid to the original owners for the purpose of purchasing the suit property. He has produced abstract of city survey record at Exh.76. Said witness has stated that after verifying that there is no encumbrance over the suit property, he decided to purchase the suit property. Said witness has deposed that at the time when he purchased the suit property, it was free from all encumbrances and that the title of the property was clear. He has said that he is a bona fide purchaser for value without notice and it is a genuine sell transaction.

26) Aforesaid is the oral and documentary evidence on record and I have gone through the same. Over and above aforesaid documentary evidence on record, defendants have also produced a copy of the evidence given by plaintiff no.1 in the criminal Court, which is at Exh.74. As per said evidence, it is clear that in her evidence before the criminal Court, plaintiff no.1 - Husenabibi has stated that her son-in-law is managing the affairs of the suit transaction. She has stated in her cross-examination that she is not aware whether any of the defendants had written any letter to her after the suit Banakhat. She has also stated that she is not aware whether the accused had sent any notice either to her or to her daughter. She has also clarified that her son-in-law is a building contractor and she is not aware whether her son-in-law had gone to pay the money.

27) Son-in-law of plaintiff no.1 has also given evidence before the criminal Court, which is produced at Exh.73 on record. Said witness in his cross-examination had admitted that the talks about the agreement in

question had taken place between accused, i.e., defendants no.1 to 3 and his mother-in-law, which had taken place in April, 1982 and he was not present at that time and he was informed about it after two days by his mother-in-law. He has stated that he came to know about mortgage of the Ahmedabad Peoples Cooperative Bank when he saw Exh.9, i.e., abstract of property register. He has denied that defendants have shown to him any documents pointing out that mortgage was already redeemed.

28) Considering the aforesaid evidence, following aspects as such are not in dispute :

- (i) That an agreement to sell was executed by defendants no.1 to 3 in favour of the plaintiffs by way of a registered document dated 28-5-1982 for Rs.28,000/-.
- (ii) As per the recitals in the said Banakhat, agreement was to be performed within six months and during that period defendants no.1 to 3 were required to satisfy the plaintiffs about title clearance of the suit property.
- (iii) On getting necessary permission from ULC authority within 90 days, sale deed was to be executed.
- (iv) During the aforesaid period of six months, the plaintiffs have never tried to write any letter nor there is anything on record to show that the plaintiffs have shown their willingness to perform their part of the contract within aforesaid period. Not only that, the plaintiffs have never asked the defendants by writing any letter that since the time limit prescribed in agreement is expiring,

documents in connection with title clearance may be shown to them.

(v) It is not in dispute that looking to the area, the property was not subjected to ULC proceedings and no permission was required under the ULC Act.

29) So far as plaintiffs are concerned, even though they were parties to the agreement, they have not deposed before the Court but the evidence is given by their power of attorney holder, Samatullah Khan at Exh.59. Said witness has stated in his evidence that, in criminal case, no oral evidence was taken, which is found to be false as the defendants have produced copies of deposition of plaintiff no.1, as well as son-in-law of plaintiff no.1 at Exhs.73 and 74. It is required to be noted that for the first time, the plaintiffs had addressed a letter on 21-12-1982, i.e., after six month's period is over. As a prudent purchaser, the plaintiffs should have written letter or should have asked defendants no.1 to 3 to perform their part of the contract within the stipulated time, or, at least, the plaintiffs should have tried to follow up the aspect about title clearance, which is admittedly not done within the aforesaid period of six months. It is also required to be noted that son-in-law of plaintiff no.1, who was managing the affairs of the suit property has stated that he is a building contractor. Looking to the recital in the suit agreement, sale deed was to be executed within 90 days after getting permission under ULC Act. It is an admitted fact that ULC permission was not required to be taken in the present case and the same is not in dispute at all. Mr.Raval also frankly submitted that ULC permission was not required to be taken.

30) Son-in-law of plaintiff no.1 has given his evidence at exh.73 wherein he has stated that he is a building contractor. It is required to be

noted that as a building contractor he was supposed to know that permission under ULC was not required to be taken in the present case, yet he has never tried to pursue the other side to execute the sale deed within the prescribed time limit nor he has written any letter to defendants no.1 to 3 in that regard. It is not even the case of the plaintiffs that there was any doubt about the title of the suit property at any point of time. It is also required to be noted that defendants no.1 to 3 had already informed the plaintiffs by letter dated 14th June, 1982, which is at Exh.62 pointing out that ULC permission is not required to be taken and that there is no encumbrance over the suit property in any manner. No doubt the plaintiff's witness-Samatullah Khan has said that said letter was sent through UPC and said letter has not been received by the plaintiffs, however, it is not possible to give any weightage to the say of said witness, because inspite of the fact that evidence was given by the plaintiffs in the Criminal Court, yet said witness has deposed in the present case that no such evidence of the plaintiffs was recorded before the Criminal Court. Said witness is a building contractor and he is son-in-law of plaintiff no.1, therefore, it is expected from him to know that when the property in question is less than 1000 sq.mtrs., no permission under the ULC Act was required and, yet said witness has never tried to point out to defendants no.1 to 3 that since no permission is required sale deed may be executed within a period of 90 days as per the recital in the suit agreement.

31) Considering the aforesaid aspect of the matter, in my view, evidence given by son-in-law of plaintiff no.1 is not believable as his evidence is not trustworthy and it does not inspire any confidence. Except the son-in-law of plaintiff no.1, the plaintiffs have not examined any other witness, including the persons who have signed the agreement to sell. So far as theory of so called mortgage pressed into service by the

plaintiffs is concerned, it can be said to be an afterthought, as there is nothing to show that any mortgage was in existence at the time when agreement to sell was entered into or in any case after September 1982 when entry regarding redemption of mortgage was made in city survey records. In this behalf a document of mortgage which is at Exh.80 is required to be considered. Though number of said exhibit is not very clear, from Rojnama it is clear that said document is exhibited at Exh.80. On the bottom of the said document there is an endorsement dated 9-7-1980 by Ahmedabad People's Cooperative Bank. As per that endorsement, said bank had given loan of Rs.3,500/- on 29-7-1977, which has been paid off on 22-5-1980 and now the property is not subject to any mortgage and bank has no right, title or interest over the suit property. Property is also described in the said document, which is stated to be the property of Dariapur Ward No.1, City Survey No.1403. It is not in dispute that it is the same property, which is subject matter of present litigation.

32) Mr.Raval, however, tried to make out his case by relying upon the abstract of City Survey as it is the case of the plaintiffs that going through document it is found that the property is subjected to encumbrance of the bank. Said document, which is at Exh.76 on record, is an entry in the property card. Even if that is to be considered, then also as per entry dated 22-9-1982, it is clear that the bank had written a letter to City Survey office on 15-7-1982 pointing out that the loan given on 26-3-1974 is repaid and entry regarding mortgage is deleted from City Survey record. Even as per said entry, on which the plaintiff heavily relies, it is clear that on 29th July, 1977 the original owners had already paid back the amount of Rs.4,000/- to the bank and if the entry in that behalf is entered into City Survey record in September 1982, it cannot be said that the property was under mortgage at the time when the

agreement to sell had taken place. Even otherwise, after September 1982, the plaintiffs had never tried to ask defendants no.1 to 3 to execute sale deed, though there was no apprehension on their part, as no permission under the ULC Act was required nor the property was subjected to any encumbrance and there was no cloud over the title of the suit property.

33) Considering aforesaid aspect, it is clear that when the transaction was entered into, the property was not subjected to any charge in any manner and, no permission under the ULC Act was required to be taken as stated in the suit agreement.

34) Considering the evidence on record, it is clear that the plaintiffs have never shown their readiness for getting the sale deed executed by paying remaining consideration within the stipulated time as provided in the agreement to sell. In that view of the matter, even if it is believed that after receiving notice dated 21-12-1982 from the plaintiffs, defendants no.1 to 3 gave a notice dated 20-12-1982, by changing the date, as alleged, and cancelled the Banakhat, then also after considering the evidence on record, it cannot be said that the plaintiffs were ready and willing to perform their part of the contract within the stipulated time. There is nothing to show that the plaintiffs had any balance with them for paying the remaining amount of consideration as per the agreement. Evidence on record makes it clear that the plaintiffs have no financial resources by which the property could have been purchased. It is also required to be noted that when the plaintiffs received the notice from defendants no.1 to 3 on 27-12-1982, for the first time, they came to know that defendants have cancelled the Banakhat, yet they have not taken any steps by writing any letter and only after receiving attornment notice from defendants no.1 to 3 dated 3-1-1983, the plaintiffs gave a

composite reply with regard to cancellation of Banakhat as well as attornment notice. Said reply dated 11-1-1983 is at Exh.67 on record. Son-in-law of plaintiff no.1 is a building contractor, and it is not expected from him not to immediately rush to defendants no.1 to 3 moment notice for cancellation of Banakhat is received by the plaintiffs on 27-12-1982. Therefore, even if it is presumed that the notice is sent subsequently, by making a show that notice was sent on 20-12-1982, then also the plaintiffs had not taken immediate steps even after 27-12-1982 till they received attornment notice. Apart from that suit was also filed after a considerable time as it was filed on 13th September 1985, i.e., after a period of about more than two years and nine months from 28th November, 1982, when the time limit as mentioned in the Banakhat came to an end. Therefore, it is clear that the suit was filed within limitation, however, it is expected from a prudent person to go to the Court immediately for obtaining injunction against the purchaser with regard to further transfer of the property, when it is brought to his notice that the property is already sold. In my view, these are the circumstances, which dis-entitles the plaintiffs from getting a decree for specific performance, which is discretionary in nature.

35) Considering the evidence on record, in my view, it is clear that the plaintiffs were not in a position to perform their part of contract within the stipulated period and they have failed to show their willingness to perform their part of the contract and in the meanwhile, defendant no.4 has purchased the suit property by way of registered sale deed and, at the last moment, the plaintiffs had rushed to the Court by filing the suit. Considering the said aspect of the matter, it cannot be said that the trial Court has exercised its discretion in arbitrary manner by refusing decree for specific performance.

36) Mr.Raval, next argued that time is never the essence so far as contract in question is concerned, for which he has relied on certain case laws. However, it is true that so far as agreement regarding sell of immovable property is concerned, normally time can never be said to be an essence of contract, but so far as facts of the present case are concerned, as per the documents on record, defendants no.1 to 3 had already written a letter of cancellation of agreement, which is received by defendants no.1 to 3 on 27th December, 1982, thereafter, till the notice of attornment was received, the plaintiffs had not even tried to meet defendants no.1 to 3 requesting them to execute the sale deed. It has come in evidence that the plaintiffs were not doing any business nor they were having any bank account in their name. As pointed out earlier, even after it was brought to the notice of the plaintiffs that premises in question is already sold to defendant no.4 by way of registered sale deed, for more than two years and nine months no steps were taken by approaching the Court for preventing defendant no.4 from transferring or alienating the property in question.

37) In connection with the question about willingness to perform the part of the contract for sell, Mr.Raval, has relied upon the decision of the Supreme Court in Acharya Swami Ganesh Dassji Vs. Shri Sita Ram Thapar, reported in AIR 1996 SC 2095. In the said case, it has been observed by the Apex Court that there is a distinction between readiness to perform the contract and willingness to perform the contract. In paragraph 2 of the judgement Apex Court has observed as under :

“2. There is a distinction between readiness to perform the contract and willingness to perform the contract. By readiness may be meant the capacity of the plaintiff to perform the contract which includes his financial position to pay the purchase price. For

determining his willingness to perform his part of the contract, the conduct has to be properly scrutinised. There is no documentary proof that the plaintiff had ever funds to pay the balance of consideration. Assuming that he had the funds, he has to prove his willingness to perform his part of the contract. According to the terms of the agreement, the plaintiff was to supply the draft sale deed to the defendant within 7 days of the execution of the agreement, i.e., by 27-2-1975. The draft sale deed was not returned after being duly approved by the petitioner. The factum of readiness and willingness to perform plaintiff's part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of the contract. The facts of this case would amply demonstrate that the petitioner/plaintiff was not ready nor capacity to perform his part of the contract as he had no financial capacity to pay the consideration in cash as contracted and intended to bite for the time which disentitles him as time is the essence of the contract."

38) So far as facts of the present case are concerned, from the evidence on record and from the circumstances of the case, it is clear that the plaintiffs have failed to prove that the plaintiffs had capacity to purchase the property or that they were ready and willing to perform their part of the contract within the stipulated time. As discussed earlier, the son-in-law of plaintiff no.1 was managing the affairs and being a building contractor, he was supposed to know that it was not necessary to take permission under the ULC Act. Not only that even after defendants no.1 to 3 sent a letter dated 14th June, 1982, the plaintiffs had never tried to perform their part of the contract nor they have asked defendants no.1 to

3 to execute the sale deed within 90 days as stipulated in the contract. There are other circumstances, which are discussed in the earlier part of this judgement, which would show that the plaintiffs were not in a position to perform their part of the contract, and subsequent act of the plaintiffs in not approaching the Court for more than two years after having come to know that the property is sold to defendant no.4 would suggest that the plaintiffs were not serious in pursuing the agreement in question. The plaintiffs have not produced any evidence to show that the plaintiffs had funds for paying sell consideration. On behalf of the plaintiffs, son-in-law of plaintiff no.1, gave evidence but as stated earlier, his evidence is not inspiring any confidence. Considering both oral and documentary evidence on record, trial Court is perfectly justified in coming to the conclusion that the plaintiffs were never ready and willing to perform their part of the contract.

39) It is also required to be noted that, in the past, defendants no.1 to 3 were required to mortgage their property, which shows that they were in financial need and since the plaintiffs have not paid the remaining amount of consideration within the stipulated time, defendants no.1 to 3 were required to sell the property to defendant no.4. Considering the evidence on record, it cannot be said that defendants no.1 to 3 were erring parties in the matter of performance of suit agreement.

40) Mr.Raval further submitted that as per Section 20 of the Specific Relief Act, jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

41) It is no doubt true that the discretion is required to be exercised by the Court not in arbitrary manner and if it is found that the trial Court has not exercised its discretion in proper manner, the Court of appeal can correct the same. However, considering the facts and evidence of this case, in my view, it cannot be said that the trial Court has exercised its discretion arbitrarily or against the principles of law. In my view, it cannot be said that by refusing the decree for specific performance, trial Court has in any way used its discretion arbitrarily or contrary to the judicial principles. Considering the totality of the evidence and circumstances of the case, in my view, trial Court is perfectly justified in refusing the decree for specific performance.

42) Mr.Raval has also relied upon the decision of the Supreme Court in **A. C. Arulappan, Appellant v. Smt. Ahalya Naik** reported in **AIR 2001 SC 2783**, wherein the Apex Court has held that jurisdiction to decree specific performance is discretion of the Court by considering the circumstances and evidence on record and whether such relief is required to be granted is the discretion of the Court, however, discretion shall not be exercised arbitrarily or in unreasonable manner. In paragraph 12, 13, 14 and 15 of the said decision, Apex Court has held as under :

“12. In the instant case, the first agreement was on 1-5-1977. No date was stipulate in the agreement for performance of the contract. The various outstanding dues payable by the defendant to the mortgagees are stated in Clause (3) of the agreement. From the tenor of the agreement, it is clear that the appellant wanted to raise money to pay off his debts. In case of breach of agreement, the appellant was to repay the advance with interest thereon and in the event of breach of agreement on the part of the plaintiff, she

would not be entitled to get back the advance. After this agreement, the respondent wrote two letters to the appellant indicating that she was not willing to proceed with the contract and that she terminated the contract. By letter dated 1-11-1977, she requested the appellant to re-pay the amount R. 42,000/- paid by her, with 12 per cent interest. She wrote another letter also stating that she wanted to settle the matter immediately and that she wanted to get interest from 1-5-1977 onwards for the amount paid by her as advance. Within a short period, the second agreement dated 10-12-1977 is alleged to have been executed between plaintiff and defendant. The appellant alleged that this agreement was brought about by coercion and threat and that he was physically manhandled by the respondent's husband. He also alleged that he caused to send a lawyer's notice on the very next day repudiating this agreement, but he could not produce a copy of the notice and the trial Court disbelieved his version. But it is important to note that the terms of the agreement dated 10-12-1977 which is sought to be enforced by the respondent are at variance with the original agreement. As per the second agreement, the sale deed was to be executed within a short period, i.e. on or before 16-1-1978. It is strange to note that under the second agreement if the appellant failed to execute the sale deed, he will have to pay double the amount of part-consideration received by him, whereas if the respondent failed to perform her part of the agreement, she need only pay a sum of Rs. 10,000/- as pecuniary damages and the balance amount was to be paid back to her by the appellant with 12 per cent interest. It is also strange to note that though the total consideration is fixed at Rs. 85,000/-, a sizeable sum, viz. Rs. 10,000/- would be retained by the respondent a deposit towards expenses for repairs and renewals of

the house.

13. From the terms and conditions adumbrated in the second agreement, dated 10-12-1977, it is clear that the respondent had been trying to take an unfair advantage over the appellant and that the circumstances in which this agreement was executed within a short period of termination of the first contract by the respondent, make it highly probable that the appellant might not have readily agreed to this contract.

14. There are other circumstances also to hold that the defendant-respondent had not approached the Court with clean hands. Admittedly, the plant schedule house was in occupation of a tenant. The appellant had agreed to evict the tenant. During the course of litigation between the appellant and the respondent, the appellant came to know that the tenant had been trying to give possession of the house to the respondent. He immediately filed a suit and obtained an injunction and recovered possession of the house from the tenant. The respondent alleged that she got possession of the house from the tenant. She also filed a suit alleging that she had been in possession of the property and she obtained possession of the house from the tenant. It is clear that she had been trying to get possession of the house even before execution of the sale deed, for which she had apparently colluded with the tenant. Moreover, the appellant in this case was clearly in impecunious circumstances and so many loans were outstanding against him. He had executed the first agreement to pay off these debts and in order to raise some funds. From the tenor of the first agreement, it is clear that parties were not very serious about the sale of the house. The fact that after few months the respondent

resiled from the agreement and sought for repayment of the money also proves this fact. The appellant had voluntarily retired from service. Admittedly, he had no other house to stay after retirement. The respondent-plaintiff had tried to take unfair advantage over the defendant and throughout the course of the transaction, she had not been fair.

15. Granting of specific performance is an equitable relief, though the same is now governed by the statutory provisions of the Specific Relief Act, 1963. These equitable principles are nicely incorporated in Section 20 of the Act. While granting a decree for specific performance, these salutary guidelines shall be in the forefront of the mind of the Court. The trial Court, which had the added advantage of recording the evidence and seeing the demeanour of the witnesses considered the relevant facts and reached a conclusion. The appellate Court should not have reversed that decision disregarding these facts and, in our view, the appellate Court seriously flawed in its decision. Therefore, we hold that the respondent is not entitled to a decree of specific performance of the contract.”

43) Mr.Raval has also relied upon the decision of the Supreme Court in **Mademsetty Satyanarayana v. G. Yelloji Rao and others**, reported in **AIR 1965 SC 1405**. By relying upon the said decision, Mr.Raval argued that since defendant no.4 had notice about the suit agreement, a decree for specific performance can be passed and he can be asked to hand over the possession to the plaintiffs by setting aside the sale deed in his favour. However, it is the case of defendant no.4 that she was not having any knowledge about the suit agreement and even if it is believed that defendant no.4 was having constructive notice about the suit

agreement, as it is a registered document, then also considering the facts of the case no decree for specific performance is required to be granted in favour of the plaintiffs and there is no question of cancelling the sale deed executed by defendants no.1 to 3 in favour of defendant no.4.

44) Thereafter, Mr.Raval has relied upon various judgements to substantiate his say that discretion is required to be exercised in a judicious manner and not arbitrarily. Mr.Raval has also relied upon the decision of the Supreme Court in **K.S.Vidyanadam Vs. Vairavan** reported in **AIR 1997 SC 1751**. In the aforesaid case, it has been held by the Supreme Court that even though time is not the essence of the contract and suit could be filed within a period of three years as provided under Article 54 of Limitation Act, but it should have been performed within a reasonable time having regard to the terms of the contract prescribing a time limit and nature of the property. If the property is a house located in an urban area, continuing steep rise in the price thereof would be a relevant factor for the Court to decide whether the delay or latches on the part of the plaintiff to perform his part of the contract would disentitle him the relief of specific performance. In the aforesaid case it is held by the Apex Court as under :

“It has been consistently held by the courts in India, following certain earlier English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the suit agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the

period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Even where time is not of the essence of the contract, the plaintiffs must perform his part of the contract within a reasonable time and reasonable time should be determined by looking at all the surrounding circumstances including the express terms of the contract and the nature of the property. While exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties). In the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades – particularly after 1973. Court cannot be oblivious to this reality. It is not possible to agree with the decision of the Madras High Court if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. The rigour of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties – evolved in times when prices and values were stable and inflation was unknown – requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, the courts do so.”

45) Mr.Raval, thereafter, submitted that under Section 21 of the Specific Relief Act, the Court may pass appropriate order regarding

award of damages. In this connection reference is required to be made to the decision of the Apex Court in Shamsu Suhara Beevi V. G.Alex reported in (2004) 8 SCC 659. The Apex Court has held that while it is proper that the Court should have full discretion to award damages in any case it thinks fit, one cannot, on the other hand, overlook the question of unfairness and hardship to the defendant, if a decree is passed against him, without a proper pleading. Therefore the court cannot award compensation in addition to specific performance in the absence of a specific claim for damages and a proper pleading stating why the relief of specific performance would be insufficient to satisfy the justice of the case and the plaintiff would not be entitled to compensation. Section 21 (5) emphatically provides that no compensation shall be awarded under Section 21 (5) unless the relief for compensation has been claimed either in the plaint or included later on by amending the plaint at any stage of the proceedings.

46) In the instant case, no such relief is prayed by the plaintiffs and therefore, there was no such issue and no evidence is led by the plaintiffs in that behalf.

47) Under these circumstances, in my view, there is no question of considering the question regarding compensation as envisaged by Section 21 (5) of the Specific Relief Act, 1963.

48) Considering the circumstances narrated herein above, this is not a case in which the Court is required to use its discretion for passing a decree for specific performance of the suit agreement. It is required to be noted that, at no point of time, the plaintiffs had shown any willingness in the matter of performance of contract by paying the remaining consideration nor they have tried to tender said amount before the

notice for attornment was received by the plaintiffs. In view of the same and considering the plaintiff's evidence, (evidence of Samatullah Khan, power of attorney holder of plaintiffs) as well as considering the documentary evidence and other evidence on record, the plaintiffs have failed to make out their case about getting decree for specific performance of the suit agreement. The trial Court has considered the evidence on record in a proper manner and has applied correct principles of law in refusing decree for specific performance. Therefore, in my view, the trial Court has rightly used its discretion in refusing decree for specific performance. Since it cannot be said that the discretion is used arbitrarily or against the settled principles of law, this Court in appeal against such a decree, would not like to take contrary view, than the one taken by the trial Court. Even otherwise, considering the evidence on record, no other view except the one taken by the trial Court is possible.

49) I, therefore, do not find any substance in this appeal. Accordingly, this appeal is dismissed with no order as to costs.

50) Record and Proceedings to be sent back to the trial Court forthwith.

(P.B.MAJMUDAR, J.)

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